

Karen Gramm <kgramm@mvcac.org>

09/15/2003 01:49 PM

To: Group Ow-Docket@EPA
cc:
Subject: Attn: Docket ID #OW-2003-0063

On behalf of MVCAC President William Hazeleur, attached please find a letter regarding support of an interim statement and guidance on application of pesticides to waters of the United States in compliance with FIFRA. This letter references Docket ID #OW-2003-063

If you have any questions, please reply to this email.



Support of Interim Statement from MVCAC President

September 12, 2003

Water Docket
Environmental Protection Agency
Mail Code 4101T, 1200 Pennsylvania Ave, NW
Washington, DC 20460

Attention: Docket ID #OW-2003-0063

Re: Support of Interim Statement and Guidance on Application of Pesticides to Waters of the United States in compliance with FIFRA

Dear Sir or Madam:

I am the President of the Mosquito and Vector Control Association of California ("Association"). On behalf of the Association, we submit these comments in response to the "Interim Statement and Guidance on Application of Pesticides to Waters of the United States in compliance with FIFRA" dated July 11, 2003 and signed by G. Tracy Mehan III and Stephen L. Johnson, both administrators for the USEPA. (See Federal Register, Vol. 68, No. 156, p. 48385.)

The Association represents the interests of 51 mosquito and vector control agencies in California. Mosquito and vector control agencies protect the state's residents from the public health and nuisance impacts associated with mosquitoes and other vectors. Mosquitoes transmit serious life-threatening diseases such as West Nile virus, encephalitis and malaria. Mosquitoes also cause substantial public discomfort and nuisance impacts, adversely affecting outdoor workers, livestock, recreation and tourism.

We support the interim statement and request and urge the USEPA to issue a final interpretation and guidance consistent with the interim statement. We concur with this clear and persuasive interpretation of the Clean Water Act and Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA") as applied to mosquito and pest control. USEPA guidance in this area is essential in light of the confusion created by the court decisions discussed in the USEPA statement and the critical public health issues affected by your decisions in this matter.

In addition to issuing the final interpretation and guidance, we also request and urge USEPA to further implement this clarification and interpretation through the adoption of federal regulations. In a rulemaking petition submitted to USEPA on January 16, 2003, the American Mosquito Control Association requested EPA to adopt two regulatory changes that would more firmly establish this clarification of federal law. We support the AMCA petition. First, the definition of "pollutant" set forth at 40 C.F.R. section 122.2 should be amended to add a third subsection to read as follows:

"(c) A pesticide product that is registered or otherwise approved under the Federal Insecticide, Fungicide and Rodenticide Act for the purpose of control of mosquito larvae or adults, other vectors (as defined by section 2(o) of that Act),

or other outdoor aquatic pests and is used for such purpose in substantial compliance with all provisions of its approved label and labeling are relevant to protection of waters of the United States."

Second, the definition of “discharge of a pollutant” in 40 C.F.R. section 122.2 should be amended by adding the following sentence at the end of the definition:

“This term also does not include the application or use of a pesticide product that is registered or otherwise approved under the Federal Insecticide, Fungicide and Rodenticide Act for the purpose of control in the atmosphere of adult mosquitoes or other vectors (as defined by section 2(o) of that Act) and is used in substantial compliance with all provisions of its approved label and labeling that are relevant to protection of waters of the United States.”

The adoption of these rule changes is essential in order to allow for the continued effective public health work of mosquito and vector control districts in California. Absent these rule changes, our member districts may not be able to effectively control the spread of West Nile virus, which has recently been identified in southern California, and other mosquito-borne diseases. Effective mosquito control requires that mosquito control districts apply larvicide to waters that may be characterized as “waters of the United States” for purposes authorized by their FIFRA registrations. The application of larvicides to water should not constitute the discharge of a pollutant under the Clean Water Act because such applications consistent with FIFRA are for beneficial, government-authorized purposes and do not fall within the scope of the Clean Water Act’s NPDES provisions. The Clean Water Act regulation of discharges is intended to apply only to material that is refuse or waste when it is discharged into waters of the United States.

Likewise, we urge the USEPA to conclude through rulemaking that the use of a mosquito adulticide in accordance with FIFRA and label requirements should not be regarded as the discharge of a “pollutant” into waters of the United States when it is similarly applied for its intended, beneficial, government-authorized purpose.

The need for clarification of federal law through federal regulation rather than a final interpretation and guidance is exemplified by the views of the State of California, State Water Resources Control Board (“SWRCB”) and its attorneys. Even with the clarification provided by the USEPA interim statement and guidance, the SWRCB remains confused about the applicability of the federal Clean Water Act to discharges of aquatic pesticides by mosquito control districts. In a memo dated July 25, 2003, a SWRCB attorney disregarded the July 11, 2003 USEPA interim guidance and concluded that, “The Interim Guidance appears to be in conflict with holdings of the Ninth Circuit Court of Appeals and the State Water Resources Control Board should not follow the Interim Guidance.” In a subsequent August 6, 2003 memo to “interested parties” from the SWRCB Executive Director, she advised that the SWRCB attorneys have recommended that the SWRCB not follow the USEPA guidance. These views demonstrate the need for a federal regulation to definitively resolve a confusing situation under federal law.

With the SWRCB charged with the responsibility of implementing the Clean Water Act in California, the USEPA guidance document may not completely resolve the uncertainties

in California. Under the broad USEPA regulatory authority at Clean Water Act section 501 (33 U.S. Code section 1361), a federal regulation on this matter would provide a definitive statement of federal law for the State of California to follow.

Without this rulemaking by the USEPA, our member districts’ ability to continue their crucial

public health work on behalf of the state's citizens could be threatened. Thank you for the opportunity to comment on the interim statement and guidance document. We look forward to USEPA's favorable clarification of federal law regarding this crucial public health issue. Please act promptly.

Sincerely,

William C. Hazeleur
President